STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION FOURTH DEPARTMENT

GAY ALLIANCE OF GENESEE VALLEY, INC.,

Plaintiff-Respondent,

v.

CITY ASSESSOR, CITY OF ROCHESTER, NEW YORK,

Defendant-Appellant.

Civil Action

Monroe County
Index No. -
8872/91

BRIEF OF AMICI CURIAE LAMBDA LEGAL DEFENSE AND EDUCATION FUND, AMERICAN CIVIL LIBERTIES UNION, AND NEW YORK CIVIL LIBERTIES UNION

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STATE OF NEW YORK SUPREME COURT
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GAY ALLIANCE OF GENESEE VALLEY, INC., Plaintiff-Respondent, v. CITY ASSESSOR, CITY OF ROCHESTER, NEW YORK, Defendant-Appellant.	Civil Action Monroe County Index No. - 8872/91

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Introduction & Interests of Amici Curiae

On March 8, 1991, the Rochester City Assessor denied appellee Gay Association of Genesee Valley ("GAGV") an exemption from property taxes for its headquarters building on Atlantic Avenue in the City of Rochester.[1] The City has provided neither a rational basis nor a consistent explanation for its decision. Initially, the City based its denial of the tax exemption to GAGV on the purported fact that GAGV was not an "educational" organization under Real Property Tax Law §420-a (hereafter §420-a). The City based that conclusion on GAGV's lack of a formal

[1]GAGV is a non-profit membership corporation, pursuant to New York Law, that has also been granted federal tax exempt status as a charitable, educational, or religious organization pursuant to Section 501(c)(3) of the United States Internal Revenue Code. (R. 166).

curriculum and students. Gay Alliance of Genesee Valley, Inc. v. City Assessor, City of Rochester, 599 N.Y.S.2d 370, 376 (Sup. Ct., Monroe County 1993). Subsequently, the City abandoned that rationale and asserted that the denial of tax exemption to GAGV was based upon GAGV's status as an "advocacy" organization. Id. Finally the City -- apparently acknowledging that it has granted exemptions under §420-a to other groups that engage in advocacy -- claimed that GAGV, unlike those other advocacy groups, was not a "charitable organization." Id.

The lower court correctly determined that each of those characterizations was inconsistent with prior applications of §420-a and, most likely, "after-the-fact rationalizations." Id. On that basis, the trial court concluded that the City of Rochester denied a property tax exemption under §420-a to GAGV simply because of GAGV's membership and its message. Accordingly, the lower court held that the City's denial of a property tax exemption to GAGV violated the free expression and equal protection rights guaranteed by the federal and state constitutions to GAGV's members.

The amici, Lambda Legal Defense and Education Fund ("Lambda"), American Civil Liberties Union ("ACLU"), and New York Civil Liberties Union ("NYCLU"), ask this Court to affirm, under the constitutions of both New York and the United States, that a city cannot isolate and discriminate against a group in such a viewpoint-based manner to deny it a significant city benefit.

Lambda is the oldest and largest national gay and lesbian rights organization. A New York non-profit corporation, Lambda was organized in 1973 "to seek, through the legal process, to insure equal protection of the laws and the protection of civil rights of [lesbians and gay men]," and, in furtherance of that purpose, "to initiate or join in judicial and administrative proceedings whenever legal rights and interests of significant numbers of [gay people] may be affected." Lambda Certificate of Incorporation, para. 2.2(a).

Lambda has appeared as counsel of record or as amicus in numerous cases involving the legal rights of lesbians and gay men in state and federal courts throughout the country. Lambda's first case, described infra at 22-23, was a successful challenge a court's refusal to approve Lambda's incorporation as a non-profit legal defense organization, under circumstances strikingly similar to the present case. Lambda has a strong interest in defending the free speech, association, and equal protection rights of lesbian and gay New Yorkers. Those rights will be significantly impinged upon if the City of Rochester is permitted to deny GAGV a property tax exemption on the basis of GAGV's message and membership.

The ACLU is a non-profit, non-partisan corporation founded in 1920 for the purpose of maintaining and advancing civil liberties in the United States. It is composed of nearly 300,000 members nationwide. The ACLU has a long history of legal advocacy to protect freedom of expression and equal protection of

the laws. Through its national Lesbian and Gay Rights Project, the ACLU engages in extensive litigation to protect people from discrimination on the basis of sexual orientation.

Consonant with its commitment to promote the civil liberties of all persons regardless of, inter alia, sexual orientation, the ACLU has a clear and significant interest in this case. Should the lower court be overruled and the City of Rochester's denial of a property tax exemption to the Gay Alliance of Genesee Valley be allowed to stand, the rights of all persons, but particularly gay and lesbian people, to free expression, association, and to equal protection of the laws would be impaired. For those reasons, the ACLU appears as amicus in this appeal.

The NYCLU is the New York State affiliate of the American Civil Liberties Union. As such, the NYCLU is similarly committed to the protection and enhancement of fundamental rights. Among the most fundamental of liberties are the rights of ideological aassociation and the right to remain free from irrational and invidious discrimination in the exercise of associational interests. Those rights are deeply implicated by the present controversy.

Because of the threat to fundamental civil liberties presented by the viewpoint-based discrimination of the City of Rochester, and because the City's denial of a property tax exemption to GAGV clearly constitutes irrational and invidious discrimination on the basis of sexual orientation, the amici urge this Court to affirm the lower court's decision and find the

City's actions in violation of the federal and state constitutions.

Argument

THE LOWER COURT CORRECTLY FOUND THAT THE DENIAL BY THE CITY OF A PROPERTY TAX EXEMPTION TO GAGV, A GROUP PROMOTING AN END TO DISCRIMINATION AGAINST LESBIANS AND GAY MEN, WHILE GRANTING PROPERTY TAX EXEMPTIONS TO GROUPS FUNCTIONALLY IDENTICAL TO GAGV, EXCEPT FOR THE CONTENT OF THEIR ADVOCACY, VIOLATED THE RIGHTS OF FREE SPEECH, FREE ASSOCIATION, AND EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS.

In the case before the court, the Assessor of the City of Rochester apparently found GAGV's goals of providing advice and assistance to victims of discrimination based on sexual orientation, public education regarding the civil rights of lesbians and gay men, and AIDS prevention and support services to be unacceptable forms of expression in Rochester. Accordingly, as the lower court determined, GAGV "received [from the City] discriminatory treatment on the basis of the character of its membership and the content of its speech." GAGV, 599 N.Y.S.2d at 376. That discrimination consisted of a denial of a property tax exemption for which GAGV qualified by law. In so doing, the City violated the rights to free speech, free association, and equal protection of the laws guaranteed, by the state and federal constitutions, to GAGV's members.

I. By Denying a Tax Exemption to GAGV Because of GAGV's Message and Membership, the City Significantly Restricted the Ability of GAGV to Communicate its Message and Thus Violated the Rights of Free Speech and Association Guaranteed to GAGV's Members.

A. The City's Denial of a Tax Exemption to GAGV Violated the Right of Free Speech Guaranteed by the Federal and State Constitutions.

1. Federal Claim.

The First Amendment to the United States Constitution plainly guarantees the freedom of speech. U.S. Const., amend. I. The Supreme Court of the United States has held consistently that as a general principle the First Amendment "means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972). Government action that burdens a fundamental right, like freedom of speech, receives the strictest constitutional scrutiny by the courts. Only a compelling government interest, implemented by narrowly tailored means, can justify imposing such a burden. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

The burden placed upon speech need not consist of an outright prohibition in order to be found unconstitutional. See e.g. Lamont v. Postmaster General, 381 U.S. 301 (1965) (invalidating statute requiring Post Office to deliver unsealed foreign mailings of "communist political propaganda" only on addressee's request). The United States Supreme Court has invalidated governmental acts in which the selective granting of benefits, through differential taxation, was designed to impinge

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ABOVE IS THE INDEX NUMBER OF THE CASE ON
WHICH YOU ARE LISTED AS AN ATTORNEY OF RECORD.

YOUR CASE HAS BEEN REASSIGNED TO:
HON. JOHN J. ARK

GAY ALLIANCE OF GENESEE VALLEY, INC.

-VS-

BUREAU OF ASSESSMENT, CITY OF ROCHESTER,

DIRECT ALL INQUIRIES TO ASSIGNED JUSTICE

upon a taxpayer's First Amendment rights. Minneapolis Star and Tribune Comp. v. Minnesota Com'n of Revenue, 460 U.S. 575 (1983) (invalidating Minnesota law that confined tax exemption to small newspapers and caused tax burden to fall disproportionally on one large newspaper).

In Minneaplois Star, for example, the U.S. Supreme Court recognized that "[a] power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected." 460 U.S. at 585. The Court noted that "[u]nless justified by some special characteristic," differential treatment in taxation "suggests that the goal of the regulation is not unrelated to the suppression of expression, and such a goal is presumptively unconstitutional." Id. Where a tax provision thus burdens rights protected by the First Amendment, the government must show an overriding interest to justify that burden.

That GAGV will be burdened by the denial of the property tax exemption is evident. In 1991, alone, the property taxes on GAGV's Atlantic Avenue Community Center amounted to slightly over $2,000. (R. 108). Though the actual effect of the City's discriminatory action is significantly burdensome in itself, more dangerous still is the chilling effect that such differential and discriminatory use of the tax code has on the freedom of expression. Writing in the context of the press freedoms guaranteed by the First Amendment, the United States Supreme Court has noted that "[t]he very selection of the press for

special treatment threatens the press not only with current differential treatment, but with the possibility of subsequent more burdensome treatment." Minneapolis Star, 460 U.S. at 588. Analogously, the very selection of GAGV, an organization devoted to serving and speaking on behalf of the lesbian and gay community, for special punitive treatment threatens all other organizations that speak on behalf of societal minorities, particularly lesbian and gay people, with future penalties for the content of their speech. The chilling effect of the City's discriminatory action on other groups, and on GAGV's expressive activity in the future, should not be underestimated. As the United States Supreme Court has recognized, "[t]he threat of sanctions may deter [the] exercise [of First Amendment rights] almost as potently as the actual application of sanctions." Id. at 588 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

The fact that the discrimination on the basis of speech content in the instant case involves the denial of a benefit, rather than an outright prohibition on speech, does not substantively alter the outcome of the lower court's analysis. This is not a case where the legislature has created a limited public benefit program and the City Assessor has merely adhered to that legislative limitation.[2] Rather, the City has excluded

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[2]The United States Supreme Court has held that a legislature may choose to fund one approach to solving a problem over another without necessarily running afoul of the First Amendment. E.g., Regan v. Taxation with Representation of Washington, 461 U.S. 540, 544 (1983) (upholding the refusal of federal tax exemptions for lobbying efforts of non-profit group). The Court, however, has never softened the prohibition on viewpoint-based

GAGV from the tax exemption in spite of its qualification for that benefit under the terms of §420-a and in direct contravention of the legislative purpose manifest on the face of the statute.

That City's exclusion of GAGV from the plain terms of the statute was aimed to suppress GAGV's expressive activity on behalf of lesbian and gay people. Consequently, the City's action violates the federal constitution's general prohibition on viewpoint-based discrimination toward speech and must be afforded the strictest judicial scrutiny. See e.g., Widmar v. Vincent, 454 U.S. 263 (1981); Mosely, 408 U.S. 92; Cox v. State of Louisiana, 379 U.S. 536 (1965); New York Times v. Sullivan, 376 U.S. 254 (1964).

The record provides ample support for the lower court's conclusion that the action of the City in denying GAGV a property tax exemption was "intended to suppress . . . ideas," Regan, 461 U.S. at 548. The inconsistent explanations of the City for its

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discrimination, and crucial to its holding in Regan was the absence of any attempt by government to curtail free expression. Id. at 548-549. Similarly, in Rust v. Sullivan the Court upheld the right of government selectively to fund government speech in narrowly focused government programs. 11 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (upholding against First Amendment challenge federal statute providing Title X funds only to medical clinics that did not provide patients with information about or referrals for abortion). The Court, however, in both Rust and Regan, was able to discern clearly the presence of a legislative intent mandating the selective funding at issue. 114 L.Ed.2d at 255; 461 U.S. at 544. In the instant case, not only is no such legislative intent present, but the plain language of the statute -- §420-a -- makes evident the legislature's intent to provide a broad range of non-profit organizations including those like GAGV, the benefit of property tax exemption.

actions, the shifting rationales posited by the City for why GAGV did not qualify for a tax exemption under §420-a, and the unprecedented quality of the denial of property tax exemption in the case of GAGV, provide more than an adequate basis for the inference drawn by the lower court: the City's uniquely narrow application of §420-a to GAGV, and GAGV alone, demonstrated the City's intention to suppress the ideas and curtail the expression of GAGV.

Moreover, the plain language of Real Property Law §420-a highlights the implausibility of the City's assertion that it applied §420-a against GAGV in good faith. Section 420-a provides that:

> Real property owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational or moral or mental improvement of men, women or children purposes, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes . . . shall be exempt from taxation . . . .

As the lower court found, the relevant statutory categories at issue here are "charitable, educational, and moral or mental improvement." GAGV, 599 N.Y.S.2d at 373. The governmental choice to subsidize only those non-profit organizations engaged in activities that are charitable, educational, or directed toward the moral and mental improvement of the citizenry is not presently in disputed as irrational. What is irrational is the invidiously viewpoint-based nature of the City's decision to deny

GAGV the benefit of §420-a when, as the lower court found, GAGV manifestly meets the requirements of the statute. Id. at 375.

The lower court reached the conclusion that GAGV came within the terms of §420-a by a straightforward analysis of the statute and prior case law construing the property tax exemption. In that analysis, the lower court relied significantly on the leading cases of Matter of Symphony Space v. Tishelman, 466 N.Y.S.2d 677 (1983), and Mohonk Trust v. Board of Assessors of Town of Gardiner, 418 N.Y.S.2d 763 (1979).

Symphony Space involved the refusal of the City of New York to grant a tax exemption, under §420-a, to a not-for-profit organization "involved in a broad range of activities" in support of the arts. 466 N.Y.S.2d at 678. The denial of tax exempt status was based upon a confined reading of the "charitable, educational, and moral or mental improvement" categories of §420-a. The Court of Appeals, in finding that the tax exemption had been improperly denied, expressly rejected a narrow construction of the categories of the statute. Likewise, in Mohonk, the Court of Appeals construed the categories of "charitable, education, and moral and mental improvement" liberally, finding that a land trust devoted to the preservation of wilderness fell within those categories for the purpose of determining tax exemption under the Real Property Law. 418 N.Y.S.2d at 765.

The broad language of the statute, and those cases unequivocally interpreting it, thus put the City on notice that a multi-purpose organization like GAGV qualifies for property tax

exemption under §420-a. The only plausible explanation for the City's shifting and contrary interpretation of §420-a is simple hostility toward GAGV's message and membership. The obvious point of Symphony Space and Mohonk, as the lower court correctly saw, was that the exemption categories of §420-a are to be construed liberally.

In both Symphony Space and Mohonk, the Court of Appeals interpreted §420-a as including within the scope of "charitable, educational, and moral or mental improvement" a wide variety of non-profit organizations. The factual dissimilarity between organizations like GAGV, the one in Symphony Space, and the land-trust in Mohonk, far from undermining the lower court's analysis, provides compelling evidence for the point made by the lower court in this case: namely, that given the vastly disparate organizations and purposes that have been subsumed under the exemption categories of §420-a, the denial of tax exempt status to GAGV on the grounds that it did not fall within those categories was manifestly irrational and unquestionably tied to prejudice.

As the lower court found, "all other applications were correctly weighed [by the City] according to the broader views taken by the Court of Appeals [in cases like Symphony Space and Mohonk]." GAGV, 599 N.Y.S.2d at 376. The record of the City in applying §420-a to all other non-profit organizations demonstrated decisively that the City had exercised its power to grant tax exemptions in a manner that discriminated on the basis

of viewpoint. One set of criteria were applied to non-profit groups rendering service and speaking on behalf of the gay and lesbian community, and another set of criteria were applied to everyone else. In finding that the City's action was in violation of the constitutional rights of GAGV's members, the lower court simply reaffirmed the principle that government action, in order to be constitutional, cannot be arbitrary or capricious.

2. State Claim

Besides constituting a patent violation of the federal constitutional right of free expression of GAGV's members, the City's action also violates the separate and independent guarantee of freedom of speech found in the constitution of the state of New York. See N.Y. Const. art. I, §8 (providing "[e]very citizen may freely speak, write, and publish his sentiments on all subjects . . . and no law shall be passed to restrain or abridge the liberty of speech"). The New York Court of Appeals has explicitly held the guarantee of free expression articulated by Article one, section eight, to be "at the very least . . . of no lesser vitality than that set forth in the Federal Constitution," Bellanca v. State Liquor Authority, 445 N.Y.S.2d 87 (1980), cert. denied, 456 U.S. 1006 (1982), and "often broader than the minimum required by the federal constitution." O'Neill v. Oakgrove Constr., 528 N.Y.S.2d 1 at 4, n. 3 (1988); see also, Immuno A.G. v. Moor-Jankowski, 566 N.Y.S.2d 906, cert. denied 111 S.Ct. 2261, 114 L.Ed.2d 713

(1991); Arcara v. Cloud Books Inc., 510 N.Y.S.2d 844 (1986). As now Chief Justice Kaye has noted, the right to free expression embodied in the New York Constitution is "materially different -- more expansive -- than the First Amendment." (Kaye, J. concurring). O'Neill, 528 N.Y.S.2d 1, 6 (1988).

Article one, section eight of the New York constitution, "prohibits the use of official authority which acts to restrain or abridge the liberty of speech," O'Neill, 528 N.Y.S.2d at 4, n. 3, and guarantees, "in affirmative terms, the right of [New York] citizens to 'freely speak, write and publish.'" Id. (quoting New York Const. Art. I, §8). In Arcara, for example, the State sought an order closing an adult bookstore under the public health laws because illegal sexual activities were taking place on the store's premises. 510 N.Y.S.2d at 845-46. The order would have closed the premises of the bookstore for one year, but did not legally terminate or suspend the bookstore's business. Id. at 846. The United States Supreme Court found that the closure of the bookstore, under the public health law, would not violate the First Amendment to the U.S. Constitution. Id. at 845. On remand, however, the Court of Appeals, noting New York's "long history of fostering freedom of expression," id. at 846, found that the bookstore's closure would violate the freedom of expression guaranteed by article one, section eight, of the New York Constitution. Id. at 847. The Court held that even for government action that places an incidental burden on speech, the government must show a "legitimate and important state

interest" and that incidental burden imposed must be no broader than needed. Id.

In the instant case, the burden imposed upon GAGV by the denial of a property tax exemption furthers no legitimate or important government interest, while significantly impinging upon the freedom of speech of GAGV's members. Accordingly, it is clear that the action of the City in denying a property tax exemption to GAGV, based upon the viewpoints expressed by GAGV, is invalid under the New York Constitution.

B. The Action of the City, in Denying GAGV a Property Tax Exemption, Also Impinges Upon the Freedom of Association Guaranteed by the State and Federal Constitutions.

Both the federal and state constitutions establish a right of association. U.S. Const. Amend. I; N.Y. Const. art. I, § 9 (providing, "[n]o law shall be passed abridging the rights of the people peaceably to assemble"). The right to associate freely guarantees that the government cannot restrict a group's liberty to associate based on its philosophy. Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981); NAACP v. Button, 371 U.S. 415 (1963). The right of association is not exhausted, however, by the "right . . . peaceably to assemble" explicit in the First Amendment. Roberts v. United States Jaycees, 468 U.S. 609, 617-19 (1984). The United States Supreme Court has determined two senses to the constitutionally protected right of association, terming those senses "intimate association" and "expressive association." Id. at 617. In the first sense, the Court has found that

> [C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty.

Id. at 617-18. In the second sense, the Court has held that freedom of association entails the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." Id. at 622.

The associational rights of the members of GAGV are implicated in both senses by the City's refusal to extend to GAGV a tax exemption the City has uniformly afforded to similar groups. As the United States Supreme Court noted in Roberts, "In particular, when the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association in both its forms may be implicated." Id.

The construction of a community center by the lesbian and gay community of Genesee Valley represented a common endeavor that involved both intimate association -- the building of personal relationships fundamental to a society that protects individual dignity -- and expressive association -- the gathering of people with similar needs and interests to educate and advocate for reform in the legal and social order. The City's denial of a property tax exemption for GAGV's community center

makes it significantly more difficult for GAGV's members to maintain these vital associations.

Courts, further, have recognized that the organized efforts of lesbians and gay men to gain a voice in their communities so as to educate the public about issues of concern to them and to obtain better treatment from both individuals and the government are an example of associational activity "unequivocally" protected by the constitution of the United States. See Gay Students Organization v. Bonner, 509 F.2d 652, 660 (1st Cir. 1974).[3] Associating with others in ways that openly identify oneself as gay, lesbian or bisexual is also one of the forms of expressive association protected by the First Amendment. Gay Law Students Association v. Pacific Telephone & Telegraph, 24 Cal.3d 458, 487-88, 595 P.2d 592 (1979) ("coming out of the closet" and associating with other lesbians and gay men are protected political activities).

The establishment of a community center -- as a place where lesbians, gay men, and those who support their human rights can gather and organize -- plays an essential part in effectuating the right to associate peaceably guaranteed by the New York and federal constitutions. The denial of a property tax exemption by the City of Rochester will, without furthering any significant countervailing state interests, seriously impinge upon GAGV's right of association. Accordingly, this Court should affirm the

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[3]See also Spence v. Washington, 418 U.S. 405 (1974); Papish v. Board of Curators of Univ. of Missouri, 410 U.S. 667, 670, reh'g denied, 411 U.S. 960 (1973); Button, 371 U.S. 415.

lower court's determination that the City's action was unconstitutional.

II. The City's Denial of a Property Tax Exemption to GAGV While Routinely Providing Such Exemptions to Similar Organizations Has No Rational Basis and, Accordingly, Violates the Federal and State Constitutional Guarantees of Equal Protection of the Laws.

In addition to violating the First Amendment and state constitutional rights of free speech and association, the City's discriminatory refusal to treat GAGV and its members like other similar organizations violates federal and state guarantees of equal protection. U.S. Const. amend. XIV; New York Const. Art. I, §11 (providing, in part, "No person shall be denied equal protection of the laws of this state or any subdivision thereof"). Both the federal and state constitutions forbid government action motivated by bias or prejudice against a particular group. See City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 448-449 (1985).[4] Lesbians and gay men, and the associations they form, have an equal right to be free of invidious classification, selective application of government standards, and enforcement of government animus or hostility. Watkins v. United States Army, 847 F.2d 1329, 1336 (9th Cir.

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[4]United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 533 (1928) (if equal protection "means anything, it must at the very least mean that a bare [governmental] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Id. at 534 (original emphasis). See also Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect").

1988), modified on other grounds, 875 F.2d 699 (9th Cir. 1989) (en banc).

The court below found that "[t]the purposes of the GAGV are in general educational, charitable ... and relevant to the moral and mental improvement of the population, through the fostering of understanding between those of heterosexual and homosexual orientation." Gay Alliance of Genesee Valley, 599 N.Y.S.2d at 375. Despite GAGV's qualification for the exemption, the City refused to grant them one. If upheld, the City's discriminatory denial of tax exemption would result in depriving the entire Rochester community, gay and non-gay, of the benefits of GAGV's mission.

Stoically indifferent to the record, the City Assessor's Office claims that it did not discriminate against this institution organized by and for lesbians and gay men. Instead it asserts, without substantiation, that GAGV does not meet the criteria for tax exemption. In such situations, where discriminatory intent is not admitted, the Supreme Court has ruled that evidence such as a departure from normal patterns of behavior or administration is sufficient to prove unconstitutional discrimination. See Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 267-268 (1977).

When an intent to discriminate is not stated, the courts are satisfied if the plaintiff can show that a discriminatory purpose was a "motivating factor" in the administrative decision.

Santiago v. Miles, 774 F. Supp. 775, 797 (W.D.N.Y. 1991) (citing Village of Arlington Heights, 429 U.S. at 265. In scrutinizing the actions of the City Assessor in the instant case, the lower court concluded that "the Assessor (and the city) saw support, education and advocacy for the gay and lesbian community in a different light than it did support, education and advocacy for, e.g., residents of 14621 or 19th Ward neighborhoods. . . ." Gay Alliance of Genesee Valley, 599 N.Y.S.2d at 376. Thus, although §420-a is facially neutral, the City Assessor's administration of the law discriminated against GAGV, and against lesbians and gay men as a class.[5] Such a decision to reject the needs of lesbians and gay men without any legitimate government interest violates the core conception of state and federal equal protection.

Like other community centers and associations, GAGV directly contributes to the life of the community at large as well as the direct community of its members, the public health, and the general welfare by initiating public education and disseminating vital information, which may well reduce the incidence of bias related violence, adolescent suicide, and general societal

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[5]Compare with, Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886) ("[F]acts shown establish an administration [of licensing ordinances] directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by broad and benign provisions of the fourteenth amendment.")

tensions and misunderstandings. Gay Alliance of Genesee Valley, 599 N.Y.S.2d at 375. The City's claim that it denied the exemption based on GAGV's failure to meet the criteria because it "advocates" clearly does not withstand even the barest scrutiny; many of the Rochester-based organizations granted exemptions have an overt "advocacy" component to their purposes for being.[6]

For example, the Group 14621 Community Association, Inc. is organized to "eliminat[e] prejudice and discrimination, defend[] human and civil rights...." (R. 198 et seq.), an identical goal to one of GAGV's (R. 119). The 19th Ward Community Association wants "to create a conscious multi-racial community where individual and cultural differences are not only tolerated but celebrated...." (R. 212 et seq.). The Rochester YWCA states that its "one imperative" is "the elimination of racism wherever it exists...." (R. 217 et seq.). These community organizations express similar goals and purposes to those of GAGV and, indeed, are similar to GAGV but for the presumed sexual orientation of the majority of their members and the gay-identified political content of their objective. Gay Alliance of Genesee Valley, 599 N.Y.S.2d at 376.

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[6]For examples of Rochester groups with advocacy purposes accorded tax exemption, see: Certificate of Incorporation of Group 14621, Inc. (R. 198 et seq.), By-Laws of the 19th Council on Aging, Inc. (R. 205 et seq.), By-Laws of the 19th Ward Community Assn., Inc. (R. 212 et seq.), By-Laws of the YWCA (R. 217 et seq.).

Moreover, such "advocacy" did not disqualify the granting of property tax exemption to the Lesbian and Gay Community Services Center established in New York City, an organization which provides direct services and activities for that city's lesbian and gay community. (R. 172).

Similarly, the City's alternative attempt to justify its denial because GAGV supposedly does not have purposes of "education," "charity," and/or "moral or mental improvement of men, women or children" is both pretextual and, ultimately, irrational. As the lower court noted, §420-a states that organizations may have "two or more such purposes," Gay Alliance of Genesee Valley, 599 N.Y.S.2d at 373, and GAGV's purposes are indeed "educational, charitable (in the sense of supplying social services free of charge) and relevant to the moral and mental improvement of the population." Id. at 375. Furthermore, the court observed that the City Assessor's Office has routinely granted property tax exemptions to other non-profit organizations for the purposes of "education," "charity," and/or "moral or mental improvement of men, women or children." Id. at 376.

Given, then, that the City's denial was discriminatory, this Court, like the lower court, must invalidate it, absent the City's demonstrating that there was a rational nexus between its action and some legitimate government purpose. Cleburne, 473 U.S. at 499-50; see also Dahl v. Secretary of United State Navy, 62 USLW 2153, WL 328364 at *6 (E.D. Cal. 1993); Pruitt v. Cheney, 963 F.2d 1160, 1165-66 (9th Cir. 1991), cert. denied, 113 S.Ct. 655 (1992).[7] Reviewing the City's conduct under the standard

[7]In fact, should this Court find, contrary to the lower court's determination, that there is a rational basis for the City's discrimination, the inquiry would not end. Instead, because gay men and lesbians as a class meet the indicia of "suspectness" warranting more vigilant review by the judiciary, the Court ought to apply heightened scrutiny and require at least a substantial state interest in discriminating. See Watkins v.

established in these cases, the lower court determined that no rational basis existed or exists for the denial of tax-exempt status. Indeed, based on the record, the court concluded that the City's discriminatory decision was based solely on impermissible anti-gay animus, inherently irrational and illegitimate.

There is nothing new about the attempt to exercise government discretion and power so as to discriminate against lesbian and gay New Yorkers. Twenty years ago, in In re William J. Thom, 33 N.Y.2d 609 (1973), the Court of Appeals was obliged to reverse a similar inappropriate exercise of authority by the Appellate Division, which had refused to approve Lambda Legal Defense and Education Fund, Inc. as a "legal assistance corporation ... on the ground that it was neither benevolent nor charitable in purpose and that there was no demonstrated need for its existence." 40 A.D.2d 787.

What was unacceptable then when done by a court is equally intolerable now when done by a City Assessor. This Court should act to protect the right of GAGV and its members, and the rights of the entire Rochester community, to engage in valuable activities on an equal footing, free of arbitrary or

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United State Army, 875 F.2d 699 (9th Cir. 1989) (Norris, J., concurring), cert. denied, 111 S.Ct. 384 (1990); Rowland v. Mad River Local School Dist., 470 U.S. 1009, 1014 (Brennan, J. dissenting from denial of cert.), reh'g denied, 471 U.S. 1062 (1985). However, the Court need not reach this issue, nor need the "fundamental rights" prong of equal protection be invoked to trigger strict scrutiny, if the lower court's finding of no rational basis and no legitimate interest is upheld.

discriminatory government refusal of tax-exempt status to a group that deserves to have it.

CONCLUSION

In denying tax exempt status to GAGV, although it routinely granted such status to other similar groups, the Rochester City Assessor's Office violated the rights of GAGV to free speech and association, as well as equal protection of the laws, under both the federal and state constitutions. No evidence has been presented to show any legitimate reason, substantial or even merely rational, for the City Assessor's actions, and the record demonstrates, as the lower court found, that the denial in fact arose out of impermissible anti-gay animus. Accordingly, for the foregoing reasons, the decision of the Supreme Court of Monroe County in favor of granting tax except status to the appellee, GAGV should be affirmed.

Date: New York, New York
November 8, 1993

Respectfully Submitted,

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - FOURTH DEPARTMENT

----------X

GAY ALLIANCE OF GENESEE VALLEY, INC.,

Respondent,

v.

CITY ASSESSOR, CITY OF ROCHESTER, NEW YORK,

Appellant.

MONROE COUNTY
INDEX NO. 8872/91

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CERTIFICATE OF SERVICE OF BRIEF AMICI CURIAE

Ruth E. Harlow, an attorney duly admitted to practice before the courts of the State of New York, certifies that, on December 3, 1993, she served copies of the foregoing brief amici curiae upon all counsel for the parties in this appeal, by placing one copy of the brief in the U.S. mail, postage paid, for delivery to each of the following:

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Dated: New York, New York
December 3, 1993

Ruth E. Harlow

In this action, in contrast to the aforementioned cases, it is undisputed that the amount sought by Ultra for goods RBL received is owed under the parties' primary contract. That Extebank can assert that the June 12, 1991 agreement Ultra entered into with RBL nearly *six months after* the fifth amended Letter of Credit was issued by Extebank and which Extebank concedes is a "secondary or tertiary contract" permeated the Letter of Credit in any way is beyond credulity. Further, Extebank's assertions of reliance on this agreement are rebutted by Apicella's admission that Extebank's counsel first obtained a copy of this agreement through discovery proceedings in other litigation and that it was only sometime after it answered the complaint herein on October 9, 1991.

[3] Thus, the court finds Extebank's intended third-party beneficiary, lack of good faith and fraud defenses to be without merit.

Accordingly, the third and eighth affirmative defenses are dismissed.

The court also finds that defendant's assertion in sections 29 through 32 and 52 through 53 of its answer and paragraphs 9 through 19 of Apicella's affidavit fail to show that plaintiff in any way waived its right to collect under the Irrevocable Letter of Credit. On the contrary, plaintiff's submission and resubmission on December 17, 1990 and July 11, 1991 respectively indicate an intent to act on its rights.

Accordingly, the ninth affirmative defense alleging waiver, estoppel and/or ratification is dismissed.

Finally, defendant's claim that "the last Extebank heard, CHB had purchased Ultra's drafts and documents" is not supported by the exhibits and is refuted by both Lorenzo and Apicella's reference throughout their affidavits to CHB as the advising bank.

Accordingly, defendant's first affirmative defense is dismissed as without merit.

Defendant's second affirmative defense is also without merit as plaintiff concedes it is pleading in the alternative.

Accordingly, as the court finds defendant's affirmative defenses to the second cause of action to be without merit, it grants plaintiff summary judgment on its second cause of action.

[599 NYS2d 370]

GAY ALLIANCE OF GENESEE VALLEY, INC., Plaintiff, v CITY ASSESSOR, CITY OF ROCHESTER, Defendant.

Supreme Court, Monroe County, April 6, 1993

HEADNOTES

Taxation — Exemptions — Real Property Tax Exemption for Organization Supporting Rights of Homosexual Community

1. Plaintiff, a nonprofit membership organization devoted both to the needs of the homosexual community in the Rochester area and to furthering the understanding and acceptance of that community by the public, was improperly denied a real property tax exemption for its headquarters building. Plaintiff's activities, designed primarily to build understanding, eliminate discrimination, and provide counselling and support, entitle it to a mandatory tax exemption for the property which is used "exclusively for" educational, charitable, and moral or mental improvement purposes within the meaning of the tax exemption statute (Real Property Tax Law § 420-a [1] [a]). The fact that certain of plaintiff's activities are social or recreational does not defeat its claim since, in the context of the statute, "exclusive" means "principal" or "primary".

Civil Rights — Federal Civil Rights Claim — Illegal Denial of Real Property Tax Exemption to Organization Supporting Rights of Homosexual Community

2. Plaintiff, a nonprofit membership organization devoted both to the needs of the homosexual community in the Rochester area and to furthering the understanding and acceptance of that community by the public, was illegally denied a real property tax exemption for its headquarters building solely because of its membership and focus in violation of its Federal constitutional rights to equal protection, thereby rendering the City liable for a civil rights violation under 42 USC § 1983. The City Assessor's discriminatory treatment of plaintiff cannot be deemed a mere erroneous interpretation of Real Property Tax Law § 420-a since the denial of plaintiff's application was not consistent with the standards utilized for deciding other similar applications for tax exemptions. Furthermore, the City is also liable for attorneys' fees under 42 USC § 1988.

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By the Publisher's Editorial Staff

AM JUR 2d, Civil Rights, § 8; State and Local Taxation, §§ 362, 391.

CLS, RPTL 420-a (1) (a).

42 USCS §§ 1983, 1988.

NY JUR 2d, Taxation and Assessment, §§ 171, 172, 178-180, 184, 802.

ANNOTATION REFERENCES

Property tax: exemption of property leased by and used for purposes of otherwise tax-exempt body. 55 ALR3d 430.

What constitutes church, religious society, or institution exempt from property tax under state constitutional or statutory provisions. 28 ALR4th 344.

APPEARANCES OF COUNSEL

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OPINION OF THE COURT

ANDREW V. SIRACUSE, J.

[1] The Gay Alliance of Genesee Valley, Inc. (GAGV) is a nonprofit membership organization devoted both to the needs of the homosexual community in the Rochester area and to furthering the understanding and acceptance of that community by the public as a whole. In March 1990, the GAGV purchased a building to house its offices and activities. It applied to the City of Rochester for a property tax exemption under Real Property Tax Law § 420-a. The City's rejection of that application is without foundation in law and can only be explained by the nature of the GAGV's membership and focus. It thus constitutes a violation of the GAGV's Federal constitutional rights to equal protection and renders the City liable for attorneys' fees under 42 USC § 1988. In addition, the City's last-minute discovery demands are so clearly frivolous that this court orders a hearing on possible sanctions under 22 NYCRR 130-1.1.[1]

FACTS

The Gay Alliance of Genesee Valley has among its purposes "the eradication of homophobia, the delivery of unbiased health care, employment protection, social integration, full legal rights and protection, [and] personal and financial security for all" (GAGV By-laws and Const, preamble). In furtherance of these aims it seeks to research and advance gay liberation and equal rights for persons of homosexual orientation, improve such people's quality of life and create a physical focus for the gay and lesbian community. It also furnishes advice and assistance for those discriminated against on the

1. The facts have been edited and those sections of the decision dealing with the City's discovery demands have been cut, but the remaining sections of the legal discussion have not been edited.

basis of sexual orientation, and educates the larger public about the civil rights of gay and lesbian citizens (GAGV Certificate of Incorporation). Its activities include regular social and educational programs, a free newspaper, a speakers' bureau and a telephone hotline. Among its responses to the AIDS crisis are a series of safe sex workshops and support for survivors of those who have died of AIDS.

The GAGV was granted exemption from Federal taxation on November 19, 1981, but the property tax question did not arise until it purchased a headquarters building on Atlantic Avenue in the City of Rochester, in March 1990. On January 28, 1991, it applied to the City for a tax exemption under Real Property Tax Law § 420-a. Given a choice on the application of checking "Religious", "Charitable", "Hospital", "Educational", or "Moral or mental improvement of men, women or children", it chose "Educational" as its purpose.

On March 8, 1991, the City Assessor denied the application. The rejection letter enclosed a memorandum stating that educational exemptions were limited to applicants which "conduct organized instructional programs, with a curriculum, classes, and a faculty."

The GAGV brought an administrative appeal on March 22, 1991. In preparation for the decision, the municipal attorney wrote another memorandum maintaining now that there was a distinction between education and advocacy. In the *Matter of Symphony Space v Tishelman* case (60 NY2d 33, cited by the GAGV) an informal, nondegree-granting institution was held to have an educational purpose. Once "learning is instigated by the *teacher",* however, the institution was no longer educational but advocacy-oriented; although the Alliance's activities "are informative and probably beneficial", "because those activities are driven by a specific point of view, a mission, a goal, a desire to cause social change, rather than a neutral and disinterested offering of knowledge for its own sake, the Gay Alliance does not * * * qualify for tax exemption."

On August 24, 1991 (after an indirect rejection of its application), the GAGV brought the present action. On October 15, 1992, the GAGV moved to amend its complaint to add a cause of action under the Federal Civil Rights Act (42 USC § 1983) and a consequent claim for attorneys' fees under 42 USC § 1988. At the same time, the GAGV moved for summary judgment.

The City cross-moved for summary judgment dismissing the complaint on November 12, 1992. On December 1, 1992, this court denied both motions without prejudice to renew and returned the matter to the City for an explicit ruling on the GAGV's administrative complaint. That ruling, which was dated December 31, 1992, rejected the application without explanation.

The GAGV then renewed its motion to amend the complaint. At oral argument, on February 18, 1993, the City conceded that no further factual submissions were required, at least insofar as the property tax issue was concerned. By a decision dated February 19, 1993, subsequently converted into an order and entered February 26, 1993, this court granted the GAGV's motion, rejecting the City's argument that it could only be liable under 42 USC § 1983 for acts pursuant to official policy or custom. The City was duly served with the amended complaint.

The present decision arises from the Alliance's two motions of March 23, 1993, one for a protective order under CPLR 3103[2] and the other for summary judgment. The two motions will be considered in that order. In addition, the City, in papers filed literally at the last minute under CPLR 2214, has renewed its cross motion for summary judgment.

GAGV'S ENTITLEMENT TO AN EXEMPTION UNDER RPTL 420-a

The City has conceded in earlier proceedings that the GAGV is a bona fide nonprofit organization that does work in the public interest. The only point on which the litigants part company is the interpretation of Real Property Tax Law § 420-a (1) (a).

That section sets out a legislative policy that certain property is entitled, as a matter of law, to exemption from taxation. Unlike property described in the permissive sections of the Real Property Tax Law, property that meets the test set out in section 420-a *must* be exempt. The City's references at oral argument to the tax burden placed on less affluent homeowners and to the GAGV's healthy financial status are not relevant to the issues before the court.

The section reads, in pertinent part: "Real property owned

2. Although the GAGV contests the propriety of both discovery demands, it has supplied the City with the requested financial records.

by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes * * * shall be exempt from taxation" (Real Property Tax Law § 420-a [1] [a]). For the purposes of this action the relevant categories are charitable, educational and moral or mental improvement.

The City interprets this statute as setting out a series of discrete categories. An educational organization must provide organized instruction or disseminate knowledge upon the request of the learner. A charitable organization "provides a necessary commodity or service to *needy* persons" (mem, at 8). The final category, organizations promoting the moral or mental improvement of men, women or children, is restricted to groups like the YMCA, for whose benefit the language was added by L 1893 (ch 498).

The City maintains that the GAGV conducts no classes and expresses a viewpoint, thus failing to qualify as "educational"; it distributes no funds to the needy, unlike the neighborhood advocacy groups cited by the GAGV in its papers, and is thus not "charitable"; and it is not similar in any way to the YMCA, so cannot qualify as contributing to the "moral and mental improvement" of the public.

This argument is fallacious. It is inconsistent with the statute's language, which exempts groups organized or conducted "for two or more * * * purposes", and has repeatedly been rejected by the Court of Appeals in cases which the City itself cites and consistently mischaracterizes. The City interprets *Matter of Symphony Space v Tishelman* (60 NY2d 33, *supra)* as extending the concept of "education" to include the peculiar needs of performing arts instruction. There is no language in the case amenable to such an interpretation. The Court of Appeals, in fact, explicitly addressed the very argument made by the City: "In contrast with the approach taken by this court, Trial Term, in the present case, has taken a narrow and fragmentary view of the exemption. In rejecting petitioner's argument that it was organized for educational purposes, the court focused on the fact that Symphony Space was not approved by the Commissioner of Education, was not chartered by the Board of Regents, and does not have faculty or student enrollment. The court similarly rejected the exemption under the 'moral or mental improvement' category, rea-

soning that the exemption is meant to cover only YMCA types of organizations and was not intended to cover the performing arts. However, this court has not made such requirements necessary before an institution qualifies for a tax exemption under those categories * * * *In fact, rather than dissecting each exempt purpose, this court has indicated that the statute may encompass property used primarily for various and varied charitable and educational purposes and the moral or mental improvement of the citizenry" (supra,* 60 NY2d, at 37; emphasis added). Even if *Symphony Space* might be shoehorned into the educational category—an attempt not sanctioned by the Court of Appeals words—the City's interpretation of the statute would be inconsistent with the earlier Court of Appeals decision in *Mohonk Trust v Board of Assessors* (47 NY2d 476), cited with approval in *Symphony Space.* The property at issue in *Mohonk Trust* was a wilderness reservation owned by a private trust. The Court had no difficulty finding that the Trust land was "used primarily *for an assortment of 'charitable * * * educational, [and] moral improvement of men, women or children' purposes" (supra,* 47 NY2d, at 484; emphasis added). Yet no wilderness area could qualify under the City's "fragmentary" set of tests: no classes are held therein, no funds or goods are distributed by it to the needy, and there is no similarity between it and the YMCA.

This does not end the inquiry, however, for the burden is on the taxpayer to demonstrate entitlement to the exemption *(see, Matter of New York Botanical Garden v Assessors of Town of Washington,* 55 NY2d 328; *Matter of Nassau County Council Boy Scouts v Board of Assessors,* 84 AD2d 862), and the statutory requirements should be construed strictly against the taxpayer, although "an interpretation so literal and narrow that it defeats the exemption's settled purpose is to be avoided" *(Matter of Symphony Space v Tishelman,* 60 NY2d 33, 36, *supra).* Regardless of the weakness of the City's argument, the GAGV has the burden of proof.

Similar organizations in New York City and Albany have received exemptions from property taxation, and while these decisions admittedly have no binding authority they suggest that the GAGV falls within the "educational, charitable, and moral or mental improvement" categories of section 420-a as understood in the light of the *Symphony Space* and *Mohonk Trust* cases *(supra).* To the extent the GAGV is an advocacy group, as charged by the City, it advocates not homosexuality but the legitimate rights and needs of the gay and lesbian

community, rights recognized by the City in its antidiscrimination ordinance. This is essentially an educational function. These activities also serve to build tolerance and understanding between that community and the larger public, contributing to the moral and mental improvement of the entire community. The GAGV's AIDS-related work is also educational, on a topic of pressing importance to all. The telephone hotline and the outreach and support programs for gay and lesbian youth and minorities meet similar needs and, along with the AIDS-related programs, furnish important social services that might otherwise have to be met, if at all, through tax-funded social welfare agencies.

That certain of the GAGV's activities are clearly social or recreational does not defeat its claim, for it is well settled that "exclusive" means, in the context of the statute, "principal" or "primary" *(Mohonk Trust v Board of Assessors,* 47 NY2d 476, 483, *supra; Matter of Nassau County Council Boy Scouts v Board of Assessors,* 84 AD2d 862, *supra).* The principal or primary purpose of the GAGV is to build understanding, eliminate discrimination, and provide counselling and support. That similar activities fall within the exempt categories has been recognized by the City in granting exemptions to neighborhood advocacy organizations. Group 14621, Inc., for example, is exempt; it seeks, *inter alia,*

"(a) To further the interests of the inhabitants [of the 14621 neighborhood] * * *

"(c) To promote fellowship and social intercourse among the members * * * [and]

"(e) To promote and encourage laws for the protection of the inhabitants of the area."

The 19th Ward Community Association is also exempt; its stated purposes include:

"(1) To create a conscious multi-racial community where individual and cultural differences are not only tolerated but celebrated, and where people share a sense of community; [and]

"(2) To insure that the community, through the Association, determines and receives the kinds of high quality services it needs from public and private institutions."

The City claims that these organizations are exempt because they receive government funds to administer programs benefitting low-income residents, and are thus charitable. This

argument is not a strong one, as the announced purposes of both groups show that administering programs addressed to the needy is neither a primary nor a principal purpose of either one.[3] In addition, the GAGV itself has received government grants in support of some of its programs, many of which contain a strong secondary focus on the needs of the less than affluent.

The purposes of the GAGV are in general educational, charitable (in the sense of supplying social services free of charge) and relevant to the moral and mental improvement of the population, through the fostering of understanding between those of heterosexual and homosexual orientation. Accordingly, the GAGV has met its burden of proof, and is entitled to a declaration that it is entitled to a mandatory tax exemption under Real Property Tax Law § 420-a, to the appropriate ancillary relief, and to the costs and disbursements in this action.

THE CIVIL RIGHTS CLAIM UNDER 42 USC § 1983

The City raises four defenses against the imposition of liability under 42 USC § 1983, which provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured". The first two of the City's defenses are patently frivolous, as they presuppose that the Assessor is being sued in his individual capacity. The caption itself speaks to these; the Assessor is being sued as the chief decision maker of the City with respect to tax exemptions, and thus in his official capacity.[4] The City next claims that the complaint fails to plead that the Assessor's

3. It should be noted that Group 14621's attorney, in papers drafted for a suit to force a tax exemption, characterized the organization's purpose as "charitable". This is hardly dispositive, and is not supported by a reading of the Group's papers or capable of justifying the City's decision to grant the exemption before the question was litigated.

4. At oral argument on the motion to amend the complaint, the City suggested that the Board of Assessment Review was the proper party to be sued. The City has not raised this issue in connection with the present motion, and, as noted in this court's earlier decision, the Board could have been added as a party on the court's own motion. The addition would be merely technical; no conceivable difference in the City's defense would result from it.

acts were made pursuant to official policy or custom. No such requirement exists, and exactly this point was resolved against the City in this court's decision of February 19, 1993. The issue is res judicata.[5]

The City's final defense is that each exemption stands on its own, and that the Assessor was constrained by the categories of State law. This defense requires further discussion, for not all errors of law create constitutional issues; no discriminatory purpose could be found if, for example, the City's denial of the GAGV's application was consistent with other equally improper denials, all resting upon an indefensibly fragmented interpretation of the Real Property Tax Law's categories. Such facts would support only the inference that the City routinely misconstrues the statute.

It appears from the record, however, that *only* the GAGV suffered from this misconstruction. As was discussed above, the neighborhood advocacy groups granted tax exemptions cannot be considered charitable merely because they receive some money to service the needs of low-income residents. To hold as much would be to eliminate the requirement that the group be organized or conducted *primarily or principally* for tax-exempt purposes. The stated purposes of neither organization fit within the narrow categories advanced by the City.

The record also shows that the City has granted tax-exempt status to a public broadcasting station (WXXI) and to several organizations which are at least as much counselling and advocacy groups as medical ones (Planned Parenthood, the Drug and Alcohol Council, and Cancer Action, the Association for the Learning Disabled, the Genesee Valley Heart Association). The bases for these exemptions are not shown, but the organizations do not fall within the permissive sections of the Real Property Tax Law, and the exemptions could not be

5. In that decision this court stated that the defense "is simply wrong, and rests on a discussion of case law so selective as to be misleading. *Monell v New York City Dept. of Social Services* (436 US 658), the sole case cited, explicitly declined to set out the boundaries of municipal liability, and it is clear from subsequent cases that they may be liable for acts pursuant to policy or custom *or* for single acts 'by the highest officials responsible for setting policy in that area of the government's business' *(City of St. Louis v Praprotnik,* 485 US 112, 123). As the City Assessor is charged with determining applicants' entitlement to property tax exemptions, his rejection of GAGV's application might well subject the City to liability if found to be discriminatory." The City's answer, once again, cites *Monell* as if it exhausted the range of municipal liability and does not discuss the holding in *Praprotnik.*

justified under the interpretation of the statute that the City, in essence, claims has been consistently applied to all applicants.

Moreover, the City's own position on the GAGV's ineligibility has shifted; at first the rejection was said to be based on the absence of formal curriculum and students; then the GAGV was told it was ineligible because of its advocacy focus; finally, it was told that other advocacy groups were in fact charitable organizations. These sound very much like after-the-fact rationalizations.

[2] The inference of discrimination would not be raised were there any showing that the erroneous interpretation of Real Property Tax Law § 420-a was in fact the City's standard for deciding applications. However, it seems clear that all other applications were correctly weighed according to the broader view taken by the Court of Appeals. There is only one reasonable explanation for the Assessor's denial of the GAGV's application: that the GAGV was denied a tax exemption because the Assessor (and the City) saw support, education and advocacy for the gay and lesbian community in a different light than it did support, education and advocacy for, e.g., residents of the 14621 or 19th Ward neighborhoods. The other explanations offered by the City are unsatisfactory and unsupported by the record. Thus, the GAGV's application received discriminatory treatment on the basis of the character of its membership and the content of its speech, clear denials of its constitutional rights. As the Assessor was the person whose acts as to tax exemptions may fairly be said to express and delineate municipal policy *(see generally, City of St. Louis v Praprotnik,* 485 US 112, 123, *supra; Rookard v Health & Hosps. Corp.,* 710 F2d 41, 45, n 3 [2d Cir]), his discriminatory act renders the City liable under 42 USC § 1983.

Once a violation of 42 USC § 1983 is found, there is a presumption in favor of an award of attorneys' fees to the successful party *(Annunziato v The Gan,* 744 F2d 244, 253 [2d Cir]). Such fees are not punishment but compensation to encourage the bringing of civil rights claims *(Coalition for Basic Human Needs v King,* 691 F2d 597, 602 [1st Cir]). When an officer is sued in his or her official capacity, no defense can be raised as to the officer's good faith *(Hutto v Finney,* 437 US 678, 693-700; *Coalition for Basic Human Needs v King, supra; see generally, Cohen v West Haven Bd. of Police Commrs.,* 638 F2d 496, 504 [2d Cir]); only in cases where the defendant is innocent of real responsibility and made prompt and reasonable efforts to avoid or settle the lawsuit should attorneys' fees be denied *(Annunziato v The Gan, supra,* 744 F2d, at 253-254).

None of these special circumstances are present here; indeed, the City's actions have partaken of the obstructionist. The court will entertain a motion under 42 USC § 1988 to determine the amount to be awarded. Proof will be required of the reasonableness of the fees demanded, and the City will be given an opportunity to be heard on that issue.

[Portions of opinion omitted for purposes of publication.]